IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

09 CIV. 8348

METROPCS NEW YORK, LLC,

Plaintiffs,

-against-

THE CITY OF MOUNT VERNON and the CITY OF MOUNT VERNON PLANNING BOARD,

Defendants.

Docket No. ___ CV

JUDGE ROBINSON

COMPLAINT

JURY TRIAL DEMANDED

MetroPCS New York, LLC ("MetroPCS"), by its attorneys, Cuddy & Feder LLP, as and for its Complaint against the City of Mount Vernon (the "City") and the City of Mount Vernon Planning Board (the "Planning Board") (collectively, "Defendants"), respectfully alleges as follows:

Facts Common To All Claims For Relief

Nature Of The Action

1. MetroPCS, through an affiliate, is a telecommunications carrier licensed by the Federal Communications Commission ("FCC") to construct and operate a network of wireless telecommunications facilities in the greater New York area, including the City of Mount Vernon. MetroPCS and its ultimate parent, MetroPCS Communications, Inc., are proud to serve a unique role as new entrants in the wireless marketplace committed to bringing the benefits of MetroPCS's services to communities that are underserved and to populations that are less able to afford wireless plans offered by many of MetroPCS's national competitors. These goals further the express objectives of the current administration, which makes accessibility to wireless and broadband services for such populations a federal communications policy priority.

2. Consistent with its FCC license and mission to reach customers in need of affordable wireless services, MetroPCS sought to install its network in the City of Mount Vernon where there are many people who may not be able to afford the wireless plans offered by MetroPCS's competitors. MetroPCS applied to the City's Planning Board for a routine Special Use Permit that would allow MetroPCS to co-locate six panel antennas concealed on the roof of a building which had already been approved to host the same types of antenna installations for three other wireless carriers (two of which were operational at the time of MetroPCS's application).

3. These other carriers' applications were approved, with all applications subsequent to the first being the most preferred site in the community as a matter of the City's own Zoning Code. As such, in finding a site location and developing its own installation, MetroPCS chose to mimic its proposed wireless facility after these same approved installations.

4. To MetroPCS's astonishment, after over a year of unreasonable delay in which MetroPCS complied with multiple arbitrary, extra-statutory requests for information and demands from the Planning Board and its outside consultant, the Planning Board voted to deny MetroPCS's application on September 2, 2009, which denial was then reduced to a final resolution that was filed with the City Clerk's office on September 16, 2009 (the "Resolution").

5. The Resolution cites no legitimate basis for the Planning Board's determination. Instead, the Resolution rests on the completely erroneous assertion that MetroPCS's application was somehow "incomplete," when in fact MetroPCS complied with all special use permit application requirements set forth in the City's Zoning Code.

6. The Resolution rests on the faulty premise that the Planning Board could deny the Special Use Permit and require as a matter of zoning that MetroPCS pursue distributed

antenna system ("DAS") technology that relies on optical conversion of radiofrequencies licensed to MetroPCS, involves third party DAS providers, and which would be on City-owned utility poles. The Resolution completely ignores that other competing wireless carriers are already located on, and approved for, the subject rooftop, as well as the fact that federal law preempts a municipality from engaging in third tier forms of regulation over wireless carrier technology and provision of services to the public.

7. In short, this case presents a classic illustration of the very type of unreasonable discrimination, "third tier" regulation, dilatory tactics, and attempted municipal self-dealing that Section 332(c)(7) of the Communications Act of 1934 as amended by the Telecommunications Act of 1996 (the "Telecommunications Act," the "TCA," or the "Act") was intended to address.

8. What makes Defendants' actions particularly egregious is the fact that the entire zoning process and ultimate Resolution were driven by the self-serving recommendations of Mr. Richard A. Comi, principal of the Center for Municipal Solutions ("CMS") – a consultant who has routinely tried to convince municipalities to abuse their limited zoning jurisdiction and, among other things, try to force DAS technologies on the wireless industry notwithstanding that FCC primacy preempts the field. Notably, in a prior Section 332(c)(7) litigation brought before this Court involving this municipality (Nextel of New York, Inc. v. City of Mount Vernon, 03-Civ-7175 (SCR)), the Judge expressed a concern that Mr. Comi, who also advised Mount Vernon in the instant matter, had already reviewed and predetermined the carrier's application before it had been submitted. On that basis, the Court directed that if Mount Vernon wanted to obtain a consultant engineer, in no event could that engineer be affiliated with Mr. Comi.

9. Based on the record in this case, it unfortunately appears that Mount Vernon and Mr. Comi are up to their old tricks, in that the Planning Board and the City's consultant apparently prejudged and became determined to deny MetroPCS's application not based upon any legitimate basis in law as set forth in the City's Zoning Code, not based on any non-compliance with the Code requirements, but because of a pecuniary interest in forcing MetroPCS to expand and use the City's DAS network as installed by a third party. Based on MetroPCS's actual use of the City's DAS network in other portions of Mount Vernon, MetroPCS believes this demand has nothing to do with zoning but, rather an outright economic interest which would result in the City generating revenue and Mr. Comi's firm collecting additional consulting fees based on the implementation of DAS on a per-utility-pole basis, as opposed to on a single site, which was the subject of MetroPCS's application.

10. As distasteful as this may be, based upon the City's prior actions and this consultant's self-description, these financial considerations appear to be a motivating factor for Defendants' otherwise inexplicable, discriminatory denial of MetroPCS's application for a Special Use Permit where three other competing wireless carriers were previously approved. As Mr. Comi's company's website boasts: "[w]e have obtained literally tens of millions of dollars for communities by negotiating leases for the private use of public property, water tanks and co-locating antennas on public buildings. We've never failed to achieve a dollar amount that was significantly more than was offered and in many cases two or three times the offered amount."

11. On these bases, as set forth herein, Defendants are liable for myriad violations of the Telecommunications Act as well as federal and New York law which required approval of MetroPCS's application given that all City Zoning Code requirements were satisfied. The denial of MetroPCS's application must therefore be reversed, the installation of MetroPCS's

co-located facility must be allowed to proceed, and MetroPCS should be awarded its damages, costs (including its application fee), attorneys' fees and consultant fees (including exorbitant fees imposed by Mr. Comi's firm), together with such other and further relief as the Court deems just and proper.

The Parties

12. MetroPCS is a Delaware Limited Liability Company authorized to do business in New York, with an address at 5 Skyline Drive, Hawthorne, New York 10532.

13. Defendant City of Mount Vernon is a municipal corporation duly organized and existing under the laws of the State of New York, having an address at City Hall – Roosevelt Square, Mount Vernon, New York 10550.

14. On information and belief, Defendant City of Mount Vernon Planning Board is the agency empowered under the laws of the State of New York and the City of Mount Vernon with the administrative authority to review certain special use permit applications, having an address at City Hall – Roosevelt Square, Mount Vernon, New York 10550. The Planning Board is an agency with limited zoning jurisdiction over the issuance of special use permits, as specifically provided under New York State law and the Mount Vernon City Code.

Jurisdiction And Venue

15. This Court has subject matter jurisdiction over this action pursuant to: (a) Section 332(c)(7)(B)(v) of the Telecommunications Act because MetroPCS has been adversely affected and aggrieved by Defendants' actions in violation of Section 332(c)(7) of the Telecommunications Act; and (b) 28 USC § 1331 because this is a civil action which presents federal questions arising under the Telecommunications Act. This Court has supplemental jurisdiction over any and all New York state law claims pursuant to 28 USC § 1367.

16. This Court has personal jurisdiction over Defendants in that the Southern District of New York, Westchester County, is the locus of the subject site and municipality and Defendants are municipal entities and agencies with zoning and building authority to review applications for wireless facilities at the subject site.

17. Venue is proper in this Court pursuant to 28 USC § 1391 because the claims stated herein arose in the judicial district for the United States District Court, Southern District of New York.

18. Expedited review of this action is required pursuant to Section 704 of the Telecommunications Act as codified at Section 332(c)(7)(B)(v) of the Telecommunications Act.

The Important Federal Interests At Issue In This Case

19. The United States of America has declared that there is a public need for wireless communication services such as "personal wireless services" ("PCS"), as set forth in the Telecommunications Act, and the FCC rules, regulations and orders promulgated pursuant thereto.

20. The Telecommunications Act was intended by Congress to "provide for a pro-competitive, deregulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies to all Americans."

21. The FCC regulates the provision of wireless services to the public.

22. The FCC licenses providers of personal wireless services to use limited resources, frequencies and spectrum allocated by the FCC for the provision of such services to the public.

23. FCC rules, regulations, orders and licenses for personal wireless services require licensees to construct wireless facilities and provide such services to the public in specified timeframes or risk revocation of their licenses.

24. The Telecommunications Act, while preserving State and local authority over the placement, construction or modification of wireless facilities, expressly preempts State or local governments from regulating such facilities in a manner which unreasonably discriminates against carriers attempting to provide such services. The Telecommunications Act also requires State or local governments to support their written decisions with substantial evidence contained in a written record and act within a reasonable period of time on zoning applications. As set forth herein, Defendants' discriminatory, dilatory, and unsupported actions have completely run afoul of these federal mandates.

MetroPCS's Wireless Service

25. MetroPCS provides mobile telephone and other personal wireless communication services to the metro New York public pursuant to Advanced Wireless Services ("AWS") licenses acquired for over three hundred sixty million dollars ($360,000,000.00) in 2006 FCC auctions. MetroPCS's customers communicate through handsets, mobile telephones, and other media via a network of personal wireless service facilities. Each wireless facility operates at low wattages and uses the finite amount of the radio frequency spectrum allotted to MetroPCS by the FCC.

26. The FCC's decisions to auction AWS spectrum and associated licensing requirements which mandate that MetroPCS complete construction and build-out of its wireless facilities in its licensed service areas, including Mount Vernon, evidence a national policy to provide competitive wireless services to the public. The current administration has emphasized

the public need for the provision of broadband wireless telecommunication services, particularly to those populations who are underserved or who otherwise may not be able to afford the services offered by larger national wireless companies (MetroPCS's customer base).

27. The FCC's granting of a license to MetroPCS constitutes a finding that the public interests will be served by MetroPCS's services, consistent with the public policy, as formulated by Congress, "to make available so far as possible, to all people of the United States...a rapid, efficient, nationwide and worldwide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication." 47 U.S.C. § 151 (emphasis added).

28. The public need for the wireless services that MetroPCS is trying to bring to the people of Mount Vernon was recently underscored by a White House initiative to bring such services to more Americans. As stated in a July 1, 2009 Press Release issued by the White House's Office of the Vice President, $4 Billion was recently allocated under the American Recovery and Reinvestment Act "to help bring broadband service" (which service includes broadband wireless services offered by MetroPCS) "to un-served and underserved communities across America."

29. The provision of vital, wireless services is only possible through the installation of numerous wireless facilities in order to create a network of wireless facilities independently operated by each wireless carrier. Typically, a wireless facility consists of up to twelve (12) flat panel antennas approximately five-to-six feet high by one foot wide, which may be mounted on existing buildings or structures or attached to a tower (in this case MetroPCS needed only six antennas). Each wireless facility services a specific area, the exact radius of

which is dependent upon topography, including the terrain, existence of trees, buildings, and other obstructions which impact the effectiveness and propagation of the radio frequency signals utilized in the provision of wireless services.

30. A wireless facility must be capable of seamlessly "handing off" communications to another adjacent wireless facility within each wireless carriers' respective system. Otherwise, gaps in wireless services will exist such that customers cannot initiate or receive communications and/or communications will be "dropped" in these areas. Existing gaps in, and increasing demand for, wireless services by the public requires the installation of additional wireless facilities by MetroPCS across the State of New York and specifically in and around the City of Mount Vernon.

31. MetroPCS's Radiofrequency ("RF") Engineers conduct detailed technical analyses to determine where wireless facilities must be installed in order to provide the "seamless" coverage needed to address the topographical and technological limitations involved in the provision of its wireless services. Unlike wire-line communications, wireless service cannot be piped or wired to users from a distant facility such as in the case of landline telephone service. Rather, each wireless facility is itself the "generating" facility with radio waves linking users to wireless service.

32. Alternative locations for wireless facilities needed to remedy gaps in, and poor quality, service are ideally situated at the centerpoint of the area where wireless service is poor to non-existent. As a result of these technological requirements and limitations, the necessary location for the installation of any wireless facility is wholly unrelated to municipal, zoning, or other artificially created boundaries.

MetroPCS's Application for the Proposed Facility

33. On or about June 19, 2008, after an initial April 22, 2008 pre-application conference between the City's consultant's representative, Mr. Comi (who, on information and belief is a principal of CMS), and MetroPCS's counsel, MetroPCS submitted its application to install a Wireless Telecommunications Facility on the rooftop of an existing building located at 590 East 3rd Street in Mount Vernon (the "Site") pursuant to Section 267-28(J) of the City Zoning Code.

34. Annexed to the zoning application were numerous exhibits including a report by one of MetroPCS's Senior RF Engineers confirming that MetroPCS's existing wireless network is not adequate to properly serve its customers who live and travel in Mount Vernon. That report advised the Planning Board that because MetroPCS was a new entrant to the greater New York market, it did not then have the service coverage it needed in Mount Vernon. The report specified that there was an unserved area of RF signal coverage within the City, as characterized by the inability to originate or terminate calls on MetroPCS's wireless network.

35. The proposed Site (referenced as NY6005) would provide service to this area, which included East 3rd street and the surrounding neighborhood, as well as a section of a vital Westchester County artery – the Hutchinson River Parkway north and south of that location.

MetroPCS's Application Sought The Same Treatment As The Other Co-located Providers

36. On Page 1 of the letter submitting MetroPCS's application, MetroPCS pointed out that its wireless competitors who provide functionally equivalent services, Nextel and T-Mobile, were already operating on the rooftop Site and that AT&T had been recently approved by the City for the installation of a wireless rooftop facility at the Site.

37. MetroPCS made clear that the Site is classified in the R2-4.5 (Two Family Residence) and NB (Neighborhood Business) Zoning District and that wireless telecommunications facilities were permitted in this District pursuant to Section 267-28(J) of the City Zoning Code, subject to the issuance of a special use permit by the Planning Board.

38. MetroPCS also showed in its application that its facility would be substantially the same as the facilities on the Site for other carriers who provide functionally equivalent services, consisting of six rooftop panel antennas with unmanned equipment cabinets to be located (out of sight) in a secure basement room. The antennas would be mounted behind "stealth" screening designed to match the existing building, and the antenna height was designed to be equal to or lower than the height of the T-Mobile, Nextel and AT&T facilities.

39. Attached as Exhibit L to MetroPCS's application were copies of the Planning Board's prior resolutions granting the applications of Nextel (allowing for twelve antennas as compared to MetroPCS's six) and Cingular Wireless PCS (n/k/a AT&T) (also allowing for twelve antennas).

MetroPCS's Application Demonstrated
Conformance With The City Of Mount Vernon Zoning Code

40. Pages two through eight of MetroPCS's application demonstrated that MetroPCS fully complied with all requirements of the City's Zoning Code and advised that approval of MetroPCS's application was not only warranted based on this full compliance, but that such approval would also be consistent with the procedural and substantive requirements of Section 704 of the Telecommunications Act.

41. With respect to those wireless facility provisions in the City's Zoning Code, MetroPCS established that the existing building at the Site (which would be a co-location with three other carriers) constitutes the highest priority under the Zoning Code. The facility's

visual impact would also be minimal, given that the antennas would be mounted behind stealth screening designed to match the color of the existing building, and would not exceed lower than the height of other existing rooftop structures. MetroPCS highlighted these points based on the site plan that was submitted with the application and the photosimulations annexed as Exhibit G to its application. Notably, MetroPCS also pointed out (and demonstrated with the photosimulations) that MetroPCS's facility would be consistent with the facilities of T-Mobile, Nextel and AT&T. Under New York law, Defendants were therefore not permitted to depart from their own precedent – the approvals of these carriers.

42. MetroPCS's application then went through each applicable subsection of the City's Zoning Code and confirmed, with reference to annexed Exhibits where applicable, that each such Code provision was met.

43. Notably, nothing in the Planning Board's Resolution indicated how or why any provision of the City's Code was not satisfied, thereby confirming that there was no evidence, let alone substantial evidence based on a written record, upon which the Planning Board could legally deny MetroPCS's application.

Defendants Were Placed On Notice Of The Limitations Of Their Authority
In Considering MetroPCS's Application (Which Limitations They Then Summarily Ignored)

44. The last Exhibit to MetroPCS's application (Exhibit M) advised the City of the clear federal mandate underlying the Telecommunications Act, the crux of which was to ensure that a municipality, in the legitimate exercise of its authority, did not unreasonably discriminate against a wireless carrier, which would interfere with the overriding, and preemptive, federal policy requiring the expeditious and efficient furnishing of wireless telecommunications services to all Americans.

45. MetroPCS explained that pursuant to Section 704 of the Telecommunications Act, codified in 47 USC § 332(c)(7)(B), the federal policy is to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector development of advanced telecommunications and information technologies and services by opening all telecommunications markets to competition. To further this goal, the Telecommunications Act was designed to limit state and local governmental authority to deny the construction of wireless telecommunications facilities and to regulate how such decisions are made.

46. MetroPCS then referred the Planning Board to the explicit preemptive language in Section 704(b) of the Act (47 USC § 332(c)(7)(B)), which makes it clear that there are explicit limitations on state or local regulation of the placement, construction and modification of "Personal Wireless Facilities":

a. local regulations may not unreasonably discriminate among providers;

b. a request for permission to place or construct wireless telecommunications facilities must be acted on within a reasonable time;

c. any denial to place, construct, or modify personal wireless services must be in writing and supported by substantial evidence contained in a written record.

47. Exhibit M annexed to MetroPCS's application also explained that the Telecommunications Act expressly prohibits a local zoning authority from unreasonably discriminating among "functionally equivalent service providers." *Id.* (*citing* 47 USC § 332(c)(7)(B)(i)(I); Cellular Tele. Co. v. Town of Oyster Bay, 166 F.3d 490 (2d Cir. 1999)).

48. In particular, MetroPCS pointed out that pursuant to these requirements, if wireless services carriers are already providing personal wireless services within the City of

Mount Vernon, such as Nextel or T-Mobile, decisions by zoning agencies may not discriminate and must allow for competitors to operate in the City on an equal footing. (*citing* 47 USC § 332(c)(7)(B)(iv)).

49. To further underscore the importance of expeditiously considering MetroPCS's application in accordance with the appropriate federal limitations on local zoning authority, MetroPCS also educated the Planning Board about the Wireless Communications and Public Safety Act of 1999 the ("911 Act"), which requires wireless carriers to promptly implement Basic and then emergency 911 service, so as to ensure a seamless (*i.e.*, without coverage gaps), ubiquitous and reliable end-to-end infrastructure for emergency situations in order to reduce fatalities and the severity of injuries. Needless to say, because of Defendant's denial of the application, MetroPCS's customers in the area surrounding the proposed Site remain unable to avail themselves of such infrastructure.

50. Having been notified of the overriding, important federal policies underlying MetroPCS's application, as well as the federal mandate that a municipality refrain from standing in the way of the build-out of wireless communications services, Defendants, led by an opportunistic, authoritarian consultant (whose fees have been unfairly charged to MetroPCS), then spent the next year and three months discriminating against MetroPCS and unreasonably delaying the review process, in total disregard of these federal mandates.

51. In *lieu* of proceeding in good faith, in the public interest, and in accordance with the law, Defendants wasted MetroPCS's time, as well as substantial sums of money, by "legislating" off the cuff – inventing and imposing new, extra-statutory, federally preempted requirements which Defendants applied in discriminatory fashion solely against MetroPCS (to the exclusion of other similarly situated carriers), following which Defendants

ultimately rejected MetroPCS's application without substantial evidence to support the denial (or any evidence relevant to the City's own Code for that matter), in complete derogation of MetroPCS's rights under state and federal law.

Defendants' Campaign Of Dilatory, Bad Faith Tactics

52. On July 15, 2008, Mr. Comi, acting on behalf of Defendants, issued his initial set of comments on MetroPCS's application in which he claimed, without any legitimate factual basis, that MetroPCS's application was supposedly incomplete and that MetroPCS's RF coverage plots supposedly did not demonstrate MetroPCS's need for the proposed Site.

53. Mr. Comi's "conclusion" that there was supposedly no need for the Site was not based on any scientific or RF data (and the record contains no such data) that would negate MetroPCS's analysis submitted by its Senior RF Engineer. Mr. Comi was also wholly unqualified to analyze the issue, because, on information and belief, he does not have the educational training or the field experience to qualify him as an expert consultant in the area of RF Engineering.

54. Nevertheless, because the Planning Board was essentially following Mr. Comi's lead in refusing to schedule a public hearing until Mr. Comi's comments were addressed in a manner in which he deemed the application to be complete, MetroPCS had no choice but to respond to his erroneous, unsupportable "concerns," and on September 23, 2008, MetroPCS filed a supplemental submission aimed at resolving Mr. Comi's seemingly fabricated "issues."

55. On October 24, 2008, Mr. Comi pushed back with another set of comments. He falsely asserted that MetroPCS's application was incomplete, and he tried to make an issue out of some changes in the plot submissions – to create the false impression that MetroPCS's coverage data was in flux.

56. MetroPCS explained in an October 29, 2008 e-mail response from one of its (qualified) RF Engineers that the plots changed in appearance due to a change in the signal level to in fact be consistent with other plots submitted to the City as part of MetroPCS' network. That change was shown in order to ensure that the plots consistently accounted for the signal strength being generated from an existing City DAS network that MetroPCS was using to provide coverage to other parts of Mount Vernon. MetroPCS's RF Engineer also confirmed that MetroPCS's data was accurate based upon drive testing, that the additional coverage provided by the Site would be over 60% within Mount Vernon in accordance with the Code and that all of the issues relevant to the application had been addressed, so that the application was fully complete.

57. Mr. Comi then delayed engaging with MetroPCS until over one month later, when he participated in a December 3, 2008 conference call with MetroPCS's attorneys and MetroPCS's RF Engineer, who was brought in to explain again to Mr. Comi that all of his "concerns" had been satisfied.

58. On December 15, 2008, now six months into the application process, MetroPCS, by its counsel, filed another supplemental submission with the Planning Board aimed at addressing Mr. Comi's frivolous "concerns," and requesting that the matter be placed on the upcoming January 7, 2009 Planning Board agenda for a public hearing, now that the application had effectively been delayed for a half year.

59. The December 15th letter explained, among other things, how the City's (and Mr. Comi's) preference for the employment of alternative DAS technology was not sufficient to address MetroPCS's service requirements in this case, which requirements were to ensure that MetroPCS's customers would be able to enjoy the same coverage provided to the

customers of its competitors who were already co-located on the Site, providing functionally equivalent services to non-MetroPCS customers.

60. MetroPCS explained that although there was a partial DAS network in place in the City, this network was not sufficient to fulfill MetroPCS's service obligations. MetroPCS also reiterated that its application sought to fulfill those obligations with a simple co-location of its facility with the other already existing wireless facilities owned by carriers which were similarly situated to MetroPCS.

61. MetroPCS also attached a December 12, 2008 e-mail from its Senior RF Engineer explaining, with specific reference to the collected data, that the DAS network in place was not sufficient to furnish services to MetroPCS's customers around the Site, where, in contrast, other carriers' customers were receiving service based on the co-location of those other carriers' facilities.

62. MetroPCS also reminded the Planning Board of the vital federal mandates that governed the application process. MetroPCS explicitly warned, under the heading "**ANY FURTHER DELAYS IN SCHEDULING A PUBLIC HEARING ON METROPCS's APPLICATION ARE VIOLATIONS OF THE TELECOMMUNICATIONS ACT.**" MetroPCS explained:

> MetroPCS'[s] application is governed by Section 704 of the Telecommunications Act of 1996 (the "TCA"). Section 332(c)(7)(B)(iii) of the TCA procedurally requires local governments to act on any request to place, construct or modify a wireless facility within a reasonable period of time after the request is made. It has been nearly 6 months since this application was filed with the Planning Board. Any further delays in scheduling a public hearing on its application are simply an unreasonable delay in violation of the TCA's procedural requirements. It is respectfully submitted that the Planning Board must schedule MetroPCS'[s] application for a public hearing.

63. MetroPCS's position was well supported. As one Judge in the Southern District of New York has observed, "as a rule of thumb, I believe that an application has been presumptively unreasonably delayed if it has not been acted on within six months of the date of filing. The presumption is rebuttable, of course, but in all the cases I have heard on this issue, no one has succeeded in rebutting it." Sprint Spectrum L.P. v. The Village of Tarrytown, 02 Civ. 6446 (S.D.N.Y. 2002) (CM).

64. MetroPCS also reminded the Planning Board, under the heading **"DIFFERENT TREATMENT OF METROPCS FROM OTHER FEDERALLY LICENSED WIRELESS SERVICE PROVIDERS IS PROHIBITED"**:

> In addition to the requirements of the TCA that the Planning Board act on MetroPCS'[s] Application within a reasonable period, the TCA prohibits a local zoning authority from unreasonably discriminating among functionally equivalent service providers. See *The Telecommunications Act, 47 U.S.C. § 332(c)(7)(B)(i)(I); Sprint Spectrum, LP v. Willoth*; *Cellular Tele. Co. v. Town of Oyster Bay*. The Planning Board has issued approvals for MetroPCS'[s] competitors to install rooftop wireless facilities on the very roof which is the subject of this application. Further, the installation by MetroPCS has been designed in a fully "stealthed" manor [*sic*] as compared with some of the initial applications approved by the Board. We see no basis whatsoever for disparate treatment of MetroPCS.

December 15, 2008 letter at 2 (*citing* Sprint Spectrum LP v. Willoth, 176 F.3d 630 (2d Cir. 1999), Cellular Tele. Co. v. Town of Oyster Bay, 166 F.3d 490 (2d Cir. 1999)).

65. The December 15th letter concluded by pointing out to the Planning Board that MetroPCS's application was required to be approved under Mount Vernon's Code and federal law, because it was complete in all respects.

66. MetroPCS's counsel also explicitly gave notice in the December 15th letter that: "any additional requests for information by CMS would be beyond the scope of the Planning Board's authority and constitute further delay for some unknown reason that is

irrelevant for zoning and land use purposes. The Applicant has due process rights to be heard which can only be fairly addressed at this point be *[sic]* scheduling a public hearing."

67. Incredibly, after another two weeks of delay, Mr. Comi responded on December 30, 2008 with another set of comments, again speciously and in bad faith claiming that the application was not complete. This was, at best, a stall tactic designed to discriminate against MetroPCS, which had the same right as its co-located competitors at the Site to install and operate its wireless facility.

68. The Planning Board then held a January 7, 2009 meeting, at which point Mr. Comi invented a new list of information requests and claimed, without basis, that other information was still outstanding, for the first time, over a half year after the application was first submitted. The Planning Board took Mr. Comi's cue and adjourned the hearing without taking action on the application, until Mr. Comi's new round of requests for information were satisfied, despite the fact that the information requested was irrelevant to the criteria set forth in the City's Code and that Mr. Comi's requests (primarily involving exploration of alternative DAS technology) were unwarranted under federal law.

69. By letter dated January 7th, MetroPCS objected based on the fact that its application was procedurally complete, as MetroPCS was required to submit what was mandated by the Code, not what was mandated by Mr. Comi's unilateral "legislation" of his own requirements from the Planning Board podium. In the interest of trying to break the unfair impasse and artificial delays imposed by Defendants and their consultant, MetroPCS nevertheless requested that the Planning Board provide a list of specific requests for information beyond the comprehensive data that had been provided up to that point.

70. On January 12, 2009, Mr. Comi wrote back with additional comments which appear to have been designed to further delay the application and, in violation of federal law which has preempted the field, to bully MetroPCS into accepting Mr. Comi's preference for use and expansion of alternative DAS technology instead of the Site where other carriers were already located and where (to the discrimination of MetroPCS and the underserved Mount Vernon population it is still trying to reach) other carriers were continuing to service their customers.

71. MetroPCS's counsel responded by letter to the Planning Board dated February 17, 2009, without prejudice to MetroPCS's position that its application was procedurally complete and in the interest of avoiding further unreasonable delays in violation of the Telecommunications Act.

72. Under the heading, "**MR. COMI'S DEMAND THAT METROPCS USE DAS HAS NO LEGAL OR FACTUAL SUPPORT**," MetroPCS explained that the DAS system that was then being built out by a company called Extenet in portions of the City would not be sufficient to serve the targeted area, and MetroPCS reminded the Planning Board that Mr. Comi himself admitted as much at the January 7th Planning Board meeting. MetroPCS advised the City that "[t]hroughout his review of MetroPCS's Application materials, Mr. Comi has nevertheless delayed this Board's consideration of the Application and improperly attempted to dictate the type of technology that MetroPCS use to provide its service to this area."

73. The February 17th letter then pointed out that nothing in the City's Zoning Code required MetroPCS to use a certain type of technology to provide service in Mount Vernon, and "any such provision would be unlawful and in clear conflict with the FCC's jurisdiction over wireless technologies."

74. MetroPCS also reiterated that its design of a stealth, co-located rooftop facility (essentially the same as the co-located facilities) would achieve its service requirements while complying with all of the requirements of the City's Zoning Code for the siting and design of such facilities. MetroPCS explained that the Site is the most preferred location under the City's own Zoning Code.

75. MetroPCS further explained in the February 17th letter that federal law prohibits any local zoning requirement for a carrier to use a specific technology, *i.e.*, the requirement that MetroPCS use a DAS system (which system is not even subject to review and approval under the Zoning Code, although Mr. Comi pretends otherwise and the City compelled such a result previously). Such a requirement, if successfully imposed, would have meant furthering Mr. Comi's goal (as stated on his company's website) of generating "tens of millions of dollars for communities [and presumably more income to Mr. Comi's company] by negotiating leases for the private use of public property" – *i.e.*, City utility poles where Mr. Comi's DAS system would need to be placed.

76. Based on federal law and the City's own Zoning Code, MetroPCS explained that neither the Planning Board nor Mr. Comi had the legal authority to "legislate" additional, illegal requirements:

> . . . given the local Wireless Law's specific provisions, there is simply no legal authority that gives the Planning Board, or in turn Mr. Comi, the right to compel MetroPCS to further validate its technical and siting choice in this Application . . . Mr. Comi's request for even more data requiring DAS is beyond the scope of the requirements of the City's Wireless Law as applied to MetroPCS's Application and can not be legally enforced.

77. MetroPCS also objected to being forced to pay Mr. Comi's fees based on the illegality of his conduct in requiring MetroPCS to jump through procedural hoops and pursue alternative technology (that would in turn likely profit the City and Mr. Comi, consistent with his

company's goals as stated on his website) in violation of federal law and in disregard of the City's own Zoning Code requirements:

> Mr. Comi is far beyond his legal scope of review regarding MetroPCS's pending Application and the issue of whether MetroPCS's Application is procedurally complete under the Wireless Law. Indeed, the substance of Mr. Comi's questions were largely addressed last year and to the extent he has "new" ones regarding Extenet, DAS, Pelham or other related inquiries, he should pursue them on his own for the City outside of this Application and MetroPCS objects to incurring costs for that [which] can not be legally supported or imposed on it under the City's Wireless Law. Indeed, given that Mr. Comi's position regarding DAS and MetroPCS's pending Application for a macro cell site is [legally] baseless, his motivation to continue to delay and push MetroPCS towards Extenet and DAS may be an overt attempt to increase the City's revenue from the Extenet DAS system. Or, Mr. Comi has a bias in favor of Extenet and DAS technology. Either way, this type of motivation is wholly inappropriate in the context of zoning and MetroPCS cannot be required to pursue a solution that has been demonstrated as not currently available or technically supported for its service needs in order that the City or others may benefit financially.

78. In an effort to strip Mr. Comi of any excuse to further delay the proceedings, MetroPCS provided (under protest) additional data with its February 17th letter demonstrating that the DAS "solution" that Mr. Comi continued to push would not be sufficient to address MetroPCS's customers' needs.

79. MetroPCS also reiterated why, as a legal matter, any further delays in acting on MetroPCS's application violated the Telecommunications Act – specifically Section 332(c)(7)(B)(iii), which requires local governments to act on any request to place, construct or modify a wireless facility within a reasonable time after the request (and at this eight month point, the delay was presumptively unreasonable based on federal caselaw applying the statute). MetroPCS pointed out that "Mr. Comi's repeated requests for new information beyond the scope of his review for completeness constitute an unreasonable delay" and "[a]ny further delays in

scheduling a public hearing on its Application are simply an unreasonable delay in violation of the TCA's procedural requirements."

80. MetroPCS also reiterated that the disparate treatment afforded to MetroPCS, particularly in comparison to the other carriers who were already co-located at the Site with similar designs (and with more antennas than MetroPCS was proposing), is illegal under Section 332(c)(7)(B)(i)(I) of the Telecommunications Act.

81. MetroPCS concluded:

> . . . the record on this Application clearly demonstrates that site plan and special permit approval is required for the proposed wireless telecommunication facility for purposes of Mt. Vernon's Wireless Law and Federal Law. As such, any additional requests for information by CMS would be beyond the scope of the Planning Board's authority and constitute further delay for some unknown reason that is irrelevant for zoning and land use purposes. The Applicant has due process rights to be heard which can only be fairly addressed at this point be [*sic*] scheduling a public hearing. Accordingly, we respectfully request that MetroPCS's Application be scheduled for a public hearing at its next meeting on March 4th, 2009 or an earlier date as determined by the Planning Board.

82. Inexplicably, Mr. Comi pressed on. By letter dated March 2, 2009, he continued to engage in the same exact bad behavior, without regard to the fact that the Planning Board and the City are obligated to adhere to federal law as well as its own Zoning Code, and apparently oblivious (or at least indifferent) to the fact that his bad faith misconduct and bullying tactics on the City's and Planning Board's behalf (presumably to generate profits to be gained from forcing MetroPCS to install a DAS system) represented flagrant violations of the Telecommunications Act.

83. As with all of his other dilatory and bad faith "comments," Mr. Comi continued in his March 2nd letter to push MetroPCS to pursue a DAS alternative:

> It has been the obvious stated intent of the Mount Vernon Planning Board that the preferred method of deployment for wireless telecommunications facilities within the City is via the existing DAS network.

84. MetroPCS replied with a March 31, 2009 letter aimed at further educating the City as to why its consultant's conduct was illegal and why his conduct exposed the City to serious liability.

85. The March 31st letter gave the City notice of (and also enclosed) the Southern District of New York's March 26, 2009 decision in New York SMSA Limited Partnership v. Town of Clarkstown, 603 F. Supp.2d 715 (S.D.N.Y. 2009) (WGY). MetroPCS explained that in this new case, this Court held that the Town of Clarkstown's Code provisions giving preference to "alternate" technologies, such as DAS, "interfered with a field completely occupied by Federal Law." March 31, 2009 Letter (*quoting* the Clarkstown decision). MetroPCS explained that the Town's preference for DAS was legally preempted under the Telecommunications Act, "as municipalities and local zoning authorities do not have the authority to compel use of alternative technologies."

86. MetroPCS also explained that the Clarkstown decision "demonstrates that Mr. Comi and the City . . . do not have the authority to require the use of, let alone show a preference for, DAS to provide service on this area of the City as Federal Law preempts any attempt by a local municipality to require the use of a certain technology."

87. MetroPCS informed the City in the March 31st letter that due to Mr. Comi's requests for additional information, "which primarily relate to inquiries about DAS, MetroPCS's application has been deemed 'incomplete' and a new public hearing has yet to be scheduled." Accordingly, MetroPCS urged the City to schedule a public hearing on April 1st so as to avoid any further delays in violation of the Telecommunications Act, and MetroPCS

warned that any additional requests for more information, given that MetroPCS's application was complete based on the City's own Code, would be beyond the scope of Mr. Comi's and the Planning Board's authority and constitute unreasonable delay in violation of the Act.

88. To MetroPCS's dismay, this latest effort to enlist the City's cooperation and put the application process back on a legal course was met with nothing but silence. After approximately one and one half months of inaction (and more unreasonable delay occasioned by Defendants' refusal to substantively engage MetroPCS), counsel for MetroPCS wrote again on May 12, 2009 – almost a full year into the application process – to implore Defendants to follow the law and have the matter placed on an agenda instead of being hounded into zoning purgatory.

89. In its May 12th letter, MetroPCS reminded the Planning Board (with copies to Mr. Comi and Corporation Counsel) of MetroPCS's March 31st letter and advised that MetroPCS's repeated attempts to follow up with the City simply went ignored, despite numerous calls to Corporation Counsel to expeditiously schedule a public hearing and thereby avoid further unreasonable delay in violation of the Telecommunications Act.

90. The May 12th letter also reminded Defendants that under the Clarkstown decision, a preference for DAS (which was one of Mr. Comi's primary bases upon which consideration of the application continued to be held up) was legally preempted under the Telecommunications Act, "as municipalities and local zoning authorities do not have the authority to compel use of alternative technologies."

91. MetroPCS further advised that based on Clarkstown, "Mr. Comi and the City of Mt. Vernon . . . . do not have the authority to require the use of, let alone show a preference for, DAS to provide service in this area of the City as Federal Law preempts any attempt by a local municipality to require the use of a certain technology."

92. MetroPCS also reminded Defendants that MetroPCS "has been and continues to be unreasonably delayed by Mr. Comi's repeated requests for additional information and improper attempts to dictate the type of technology that MetroPCS uses to provide service in the area of the City in the vicinity of MetroPCS's proposed facility . . . [through] such requests for additional information, which primarily relate to inquiries about DAS, MetroPCS's application has been deemed 'incomplete' and as a result a public hearing has yet to be scheduled . . . this request is simply unlawful and beyond the Planning Board's authority." On these bases, the May 12th letter requested that consideration of MetroPCS's application be scheduled for the June 3rd Planning Board meeting in order to avoid further violations of federal law.

93. Any reasonable, unbiased, and good faith consideration of the points raised by MetroPCS in the May 12th letter and its previous correspondence would have led the Planning Board to schedule a public hearing on the nearly year-old application, and approve MetroPCS's application without further delay.

94. On May 13, 2009, Defendants finally responded by way of a conference call between Mr. Comi and MetroPCS's counsel. Astonishingly, having spent the last several months playing legislator by inventing new requirements for MetroPCS to fulfill that were nowhere to be found in the Code, Mr. Comi now endeavored to speak on behalf of the City's lawyers (although, on information and belief, Mr. Comi does not have a license to practice law), arguing to MetroPCS's counsel, without any plausible or rational basis, that the Clarkstown decision somehow did not apply and was distinguishable.

95. MetroPCS's counsel memorialized the salient points of Mr. Comi's extraordinary discussion in a May 13th letter to Mr. Comi, with a copy to the City's Corporation

98. MetroPCS advised in its May 20th letter that despite its full compliance with the applicable Code provisions, Mr. Comi's firm continued to request additional information which was not required by the Code, with a focus on DAS technology and a demand to know why MetroPCS was not proposing to expand the City's DAS network. MetroPCS reiterated that these requests are well beyond the Planning Board's authority under the Code, as reiterated by the recent case law provided to the Board. MetroPCS's counsel pointed out that nevertheless, the City's "consultant continues to act in a manner violative of our client's constitutional and statutory rights in this matter."

99. MetroPCS demanded in the May 20th letter that the Board honor its right to be heard at a public hearing, which right had been materially interfered with by the consultant (Mr. Comi) dating back to Fall 2008. MetroPCS also committed to discuss its application materials in detail, and to explain why DAS is not a technology that MetroPCS planned to use in this part of the City (although MetroPCS could not be legally compelled to even address this alternative technology that the City's consultant preferred). MetroPCS warned that any further delays would be unconscionable, as well as actionable, and it again requested that a public hearing be scheduled now that almost a full year had passed since MetroPCS first submitted its application.

100. To MetroPCS's astonishment, Mr. Comi persisted in pushing his completely illegal, bullying tactics on the City's behalf, when by letter dated June 1, 2009, he again insisted that MetroPCS's application was not complete, without reference to any provision of the applicable City Code that he felt remained to be satisfied. He also again emphasized the City's preference for DAS, in total disregard of the Clarkstown decision.

101. Notwithstanding Mr. Comi's unsupportable contentions and imposition of extra-legislative, illegal requirements on MetroPCS, at a June 3rd hearing, MetroPCS's application was finally scheduled for consideration for August 5, 2009 – a full fourteen months after MetroPCS first submitted its application.

102. The August 5, 2009 hearing turned out to be a mere *pro forma* exercise without any substantive deliberation and without public comment opposing or taking issue with what was in essence a straightforward co-location application that would have little-to-no impact on the already existing wireless facility site. By law, the Planning Board then had 62 days in which to render a decision.

103. On September 1, 2009, MetroPCS's counsel wrote to the Planning Board to advise that MetroPCS's application had not been placed on the agenda for the September 2nd meeting that followed the August 5th hearing, for a decision. MetroPCS reminded the Planning Board (which apparently was not focused on its own procedures) that pursuant to Section 267-26.B(4) of the Code and Section 27-b(6) of the General City Law, the Planning Board was obligated to make its decision within 62 days of the date the public hearing was closed. MetroPCS advised that if a decision was not issued at the September 2nd meeting, then a decision issued at the meeting that was scheduled to follow on October 16th would be untimely under the City's own laws.

104. MetroPCS also reminded the Planning Board in its September 1, 2009 letter of its various correspondence dating back to February 2009 in which it cited the applicable provisions of the Telecommunications Act requiring a local government to refrain from unreasonably delaying a wireless carrier's application to construct a facility. MetroPCS also cautioned the Planning Board of the Act's prohibition against discrimination among functionally

equivalent service providers – *i.e.*, the three other wireless carriers that were either already up and running or previously approved to operate at the Site.

105. At 4:54 p.m., on September 1st, MetroPCS was advised that the matter was on the September 2nd agenda for a decision.

106. On September 2, 2009, the Planning Board finally issued a non-final memorandum indicating its decision, which was not supported by any resolution or by any evidence in the record, let alone substantial evidence as required by law.

107. In *lieu* of issuing the statutorily required decision, the Planning Administrator sent the City Clerk a placeholder – an unsigned September 2, 2009 memorandum confirming the vote to deny the application, stating that "[t]he resolution will follow shortly clearly identifying any/all reasons for the denial of the special use permit" and stating:

> According to Section 267-26A of the Zoning Code, "The application [the special use permit application] shall include a site plan meeting the requirements of Section 267-33 [of the Zoning Code]"; therefore the site plan application is automatically denied as apart *[sic]* of this application.

108. To the extent the Planning Board (or perhaps just its Administrator) was suggesting that a site plan had never been submitted, this "finding" was simply false. The Planning Board was furnished with 11 copies of MetroPCS's site plan together with the application submitted on June 19, 2008. To the extent that the Planning Board had any specific issue concerning the substance of MetroPCS's site plan, the Planning Board was obligated, as a matter of law, to be specific as to why the site plan allegedly failed to meet the requirements of the Code. It failed to do so, and to the extent the denial was based on the above-excerpted finding, it is a legal nullity.

109. On September 9, 2009, the Planning Board then filed a non-final resolution signed by William Long "as Staff to the Board" which was marked as a DRAFT

(Planning Board Secretary Lauren S. Carter confirmed to MetroPCS's counsel in a September 18, 2009 letter that the September 9th resolution was a "draft resolution").

110. That September 9th draft resolution relied almost exclusively on Mr. Comi's firm's contention that MetroPCS's application was somehow incomplete, but the draft resolution never states why the application was incomplete or what Code provision supposedly was not satisfied. The draft resolution then states that on June 3rd, the Planning Board discussed "conflicting and missing application material," without identifying this "conflicting and missing" material. The draft resolution continued: "[u]pon further discussions and requests, the applicant refuses to provide requested information and states there will be no additional material forthcoming."

111. Given that this draft resolution fails to identify exactly what requested information MetroPCS supposedly refused to furnish, and what specific information required by the Code supposedly was not furnished, this draft resolution fails to demonstrate with substantial evidence (or any evidence) upon which to justify the denial. To the extent that the draft resolution is referring to information relating to Defendants' (really, Mr. Comi's) preference for a DAS alternative, it was illegal for the Planning Board and its consultant to consider the application incomplete to the extent such information was not furnished and to deny the application on this basis.

112. The draft resolution erroneously states that MetroPCS did not provide proof of the need for the site by submitting data "showing coverage cannot be achieved by extending/expanding the existing DAS network." (Emphasis added.) This conclusion was not supported by any scientific data that would (or could) disprove MetroPCS's Senior RF Engineer's coverage plot analyses, and it is not corroborated by any consultant competent to

opine on the issue and is in and of itself contradictory. This conclusion also explicitly relied on Defendants' illegal preference for MetroPCS to employ DAS technology.

113. This illegal preference was then reiterated in the next two "WHEREAS" provisions:

> **WHEREAS**, MetroPCS is currently using the DAS network for deployment of services within the City of Mount Vernon, NY; and
>
> **WHEREAS,** the existing DAS network is the least visually obtrusive design for the deployment of wireless telecommunications services within mount *[sic]* Vernon, NY

114. The draft resolution then claimed that the "propagation maps provided continue to show conflicting information at different signal strengths, with no clear explanation for the differences." This assertion was flatly negated by the record, which contained three unrefuted written explanations from MetroPCS's Senior RF Engineer, on October 29, 2008, on December 15, 2008, and on February 17, 2009, respectively.

115. The draft resolution then stated, in purely conclusory fashion and without any supporting evidence, substantial or otherwise, that the application and information provided was incomplete, following which the draft resolution concluded that the application was denied, without further explanation and without identifying any zoning approval criteria that MetroPCS supposedly did not meet.

116. On information and belief, on September 16, 2009, the Planning Board filed the final Resolution which was essentially identical to the draft resolution, except that it added an extra "WHEREAS" paragraph which falsely asserted that MetroPCS was asked to look at other buildings where there are fewer or no wireless facilities in existence as alternative site candidates and that detailed information was supposedly not provided.

117. This additional finding defied rationality, and smacks of the Planning Board trying to come up with some sort of 11th hour pretextual justification to bolster its unsupportable denial, as there is no good faith, plausible reason why the City would even want MetroPCS to consider installing its facility on a building where at present there are no wireless facilities, when the City's own Zoning Code mandates that the City prioritize the placement of wireless facilities on sites where other carriers' facilities are already located. In addition, this conclusory "finding" ignored that Page 7 of the cover letter to MetroPCS's application pointed out that under Section 267-28(J)(5), "the proposed Facility is a co-location on an existing building rooftop and will not increase the height of the existing building. As such, the proposed site represents that highest priority pursuant to Section 267-28(J)(5)(B) for the siting of wireless telecommunications facilities . . ." The Resolution also ignored that Exhibit I to MetroPCS's application contained an alternative site analysis as required by the Code.

118. The Resolution was also deficient in that it failed to make any determination concerning whether the application warranted a negative declaration, or any action, under the State Environmental Quality Review Act ("SEQRA"), further evidencing that the Planning Board did not have any serious intention of processing MetroPCS's application in accordance with its usual procedures and in compliance with state and local law, and that Defendants were apparently preoccupied with the predetermined result they wanted to reach, rather than with conducting the proper inquiry as to whether their procedures and the City's Code criteria were satisfied.

119. The City's denial, by its Planning Board, appears to have blindly followed Mr. Comi's lead and attempted to expand the limited municipal authority granted under the Telecommunications Act to a point where the City is legislating-by-consultant's-fiat and

effectively acting as a "mini-FCC." Defendants' conduct in determining MetroPCS application thus falls drastically short of the standards set by local and federal law.

120. The City was required to act on the application based on the provisions of its own Zoning Code, which MetroPCS completely satisfied. Instead, the City acted based on MetroPCS's alleged failure to comply with extra-legislative, illegal requirements invented by a renegade, opportunistic consultant whose motivation as expressed on its website is to use the municipal administrative review process as a launching point to force carriers to locate their facilities on municipal property – to the municipality's (and the consultant's) financial benefit.

121. Defendants' actions flagrantly flouted the Telecommunications Act, which required Defendants to refrain from discriminating against MetroPCS (particularly when other carriers were co-located on the Site furnishing wireless services to their customers) and to refrain from imposing the City's (Mr. Comi's) preference for MetroPCS to pursue alternative DAS technology. Defendants also completely disregarded the Telecommunication Act's prohibition against unreasonably delaying this carrier's application, having presumptively violated the Act by waiting well over a year before finally issuing its baseless determination.

122. In violation of federal and local law, that determination was not (and could not be) supported by substantial evidence, or any evidence that the City could have legally relied upon.

123. In sum, it appears that, as with Mr. Comi's earlier foray into attempting to interpose his own desires into Mount Vernon's deliberative processes (*see* the discussion of Nextel of New York, Inc. v. City of Mount Vernon, 03-Civ-7175 (SCR), *supra*), Mr. Comi had again prejudged and predetermined MetroPCS's application from the outset, and as in the Nextel case, it unfortunately appears that the City simply followed his lead.

MetroPCS Cannot Be Forced To Pay For Mr. Comi's Firm's Illegal Conduct

124. In a classic case of adding insult to injury, the City took the liberty of requiring MetroPCS to pay above and beyond amounts normally required of other carriers to cover consulting fees incurred in connection with the application.

125. Based on the City's Code requirements (which, as set forth below, are illegal, as they do not reasonably relate to the cost of a legitimate application review), by letter dated April 17, 2008, MetroPCS's counsel submitted a check in the amount of $8,500 to establish an escrow account for the payment of fees incurred by the City's consultant, Mr. Comi's firm.

126. To MetroPCS's astonishment, on September 4, 2009, two days after the application was denied without any legal basis, the City sent MetroPCS's counsel a letter requesting an additional $5,000 to replenish the escrow account, noting that the billing from Mr. Comi's firm through July 2009 totaled the exorbitant amount of $16,842.70 (far in excess of the typical consulting cost for any legitimate review), and that there were considerable additional fees from July 2009 going forward which had not yet been invoiced (but for which the City would attempt to hold MetroPCS responsible).

127. The $8,500 payment, and the additional $8,000+ in billings that the City expects MetroPCS to pay, as well as the City's exorbitant $6,000 fee (when application fees for all other special use permits carry a maximum of $500), is completely improper and not reasonably related to any legitimate application review process. MetroPCS is entitled to a return of the funds that were escrowed, as well as its application fee, which are wholly unrelated to the actual application review process and therefore constitute an impermissible tax that is neither permissible under the Telecommunications Act or under state and local law.

128. To the extent these funds are not returned, and the rest of Mr. Comi's firm's invoices are not disallowed, the result would be unconscionable and would only serve to unjustly enrich Defendants and their consultant, who did anything but the job that MetroPCS was supposed to be paying for – a fair and unbiased zoning review of the application filed by MetroPCS.

129. It is illegal for Defendants to require that MetroPCS compensate the City, Mr. Comi or his firm for a single penny, given Defendants' actions in unreasonably delaying the application, and then denying the application on completely illegal grounds based on fabricated requirements that are dehors the Code, and based on an illegal preference for alternative DAS technology which is preempted by federal law.

130. In sum, the provisions of the City's Zoning Code were satisfied, and MetroPCS's application was complete in accordance with the requirements of that Law. Defendants were required by law to act expeditiously and to apply the City's own Code objectively and evenhandedly.

131. In violation of the City's laws, the Telecommunications Act and federal precedent, Defendants followed the lead of a biased consultant who prejudged MetroPCS's application, and caused the City to do the same, based on an illegal preference for a DAS alternative which, on information and belief, would have lined the City's and its consultant's pockets, to the discrimination of MetroPCS, which, based on its compliance with the Zoning Code, effectively had an as-of-right entitlement to co-locate on a Site that had been approved on three prior occasions for three other carriers. Defendants, following Mr. Comi's lead, issued their biased, illegal Resolution only after over a year of intentional, unreasonable delay, while

being put on notice on multiple occasions that their actions were illegal under local and federal law.

132. As such, MetroPCS is entitled to a reversal of the City's determination and a finding that the City violated the Telecommunications Act by discriminating against MetroPCS and by unreasonably delaying the application process. MetroPCS is further entitled to an Order directing Defendants to take all required action to ensure the immediate issuance of a building permit (followed by a certificate of occupancy upon MetroPCS's completion of the build-out in accordance with City law), and directing that Defendants reimburse MetroPCS for its application fee and for consulting fees it has already advanced, and that MetroPCS is not required to pay any part of the additional $16,000+ in invoicing it received from the City (as well as the as-yet unbilled fees), together with an award of MetroPCS's attorneys' fees and such other and further relief as the Court deems just and proper.

Defendants' Delay In Issuing A Determination Was Unreasonable

133. As set forth above, precedent from this Court recognizes that a six month delay in considering a wireless carrier's application is presumptively unreasonable. In this case, the Planning Board took over twice that amount of time – just under fifteen months – before the Resolution was finally issued, and only then in response to MetroPCS's September 1, 2009 letter advising that the Planning Board was legally required to be placed on the September 2, 2009 agenda for a vote.

134. The unreasonableness of Defendants' actions in dragging out the review process, including through their wrongful insistence that MetroPCS furnish information completely unrelated to the applicable Code provisions, as set forth above, is further amplified by the fact that when an application was made for the implementation of a DAS system – the

City's preferred technology – it took the Planning Board less than three months to approve an entire DAS network consisting of 56 separate antenna sites involving the laying of 21 miles of aerial fiber optic cable on City-owned poles (some of which were right in front of residents' homes). That DAS application was submitted on May 30, 2008 (shortly before MetroPCS submitted the application at issue here), it was deemed "complete" in a month's time and the resolution approving the application was issued on August 8, 2008.

135. By comparison, the City took over a year to issue a determination on a co-location application for a single rooftop Site where MetroPCS's facilities were designed to mirror the already-approved, existing facilities owned by other carriers.

136. Under the City's own Zoning Code, the Site proposed by MetroPCS for co-location is treated as a site that is to be given the highest priority by the Planning Board. In contrast, the Zoning Code provides that the City-owned sites that were the subject of the DAS application process are given secondary priority status.

137. Yet, while Defendants did everything they could to stonewall and delay MetroPCS's application review process for the highest priority Site, the City actually fast-tracked and issued waivers in connection with the approvals issued for the 56 antenna sites on the secondary priority sites.

138. The City, led by its consultant Mr. Comi's firm, which was retained for the DAS approval process, expeditiously acted when it served the City's (and its consultant's) financial benefit.

139. In contrast, when MetroPCS declined to go along with further lining the City's (and its consultant's) pockets through an expansion of the DAS network, and opted

instead to co-locate at the Site (which did not mean extra revenue for the City), the City chose to take no action to decide MetroPCS's application for over a year.

FIRST CLAIM FOR RELIEF
(Violation Of Section 704 Of The Telecommunications Act: Unlawful Discrimination)

140. MetroPCS repeats, re-avers and re-alleges all prior allegations as if fully set forth herein.

141. Section 704(b) of the Act (47 USC § 332(c)(7)(B)(i)(I)) provides that local regulations "shall not unreasonably discriminate among providers of functionally equivalent services."

142. MetroPCS's application sought to co-locate its wireless facility on a Site where the Planning Board had previously approved the installation and operation of wireless facilities for T-Mobile, Nextel and AT&T (two of which were already installed and operational at the time of MetroPCS's application). These other carriers are providers of functionally equivalent services – personal wireless services within the City of Mount Vernon utilizing functionally equivalent equipment and technology with stealth designs that are functionally equivalent to the designs planned by MetroPCS. The denial of MetroPCS's application therefore violates the Telecommunications Act's mandate that allows for competitors to operate on equal footing.

143. While these other carriers are free to operate at and derive revenue from the Site, and their customers are provided with access to coverage in the surrounding area, MetroPCS is forced to suffer Defendants' unfair and unreasonable discrimination and disparate treatment, resulting in a loss of its revenues, as well as an inability to provide service to its customers who are located in the targeted area – many of whom are under-served in the wireless communications market and may not be able to afford the coverage provided by MetroPCS's

competitors who provide functionally equivalent services, in contravention of the overriding federal policies underlying the Act.

144. Defendants have subjected MetroPCS to selective, discriminatory and disparate treatment as compared to similarly situated wireless providers who offer functionally equivalent services, including but not limited to by compelling MetroPCS to consider (and to furnish additional information concerning) the use of alternative DAS technology in violation of federal law which preempts the field. By so doing, Defendants, led by Mr. Comi, have impermissibly engaged in "third-tier" regulation, in that Defendants are attempting to duplicate operational and service standards for wireless providers, when the applicable standards have already been established by the FCC.

145. Defendants' actions in attempting to regulate subject matter which is preempted by the Telecommunications Act and/or by FCC regulations, which actions are in contravention of Congressional intent, violate the Supremacy Clause of the United States Constitution and impermissibly create an unnecessary third tier of telecommunications regulation that extends far beyond the statutorily protected municipal interest in regulating through zoning. Defendants' actions in imposing different operational requirements on MetroPCS than those required by the City Zoning Code, and those required of other wireless carriers at the Site, have subjected MetroPCS to impermissible burdens, delays and expense in connection with the review and approval process, all of which serve as a barrier to MetroPCS's right to be competitive with other telecommunications providers.

146. Defendants' selective treatment of MetroPCS by denying its application to co-locate functionally equivalent wireless facilities to the facilities of other carriers who were

approved for, and maintain and operate, such facilities constitutes unreasonable discrimination in violation of Section 332(c)(7)(B)(i)(I) of the Telecommunications Act.

147. As such, MetroPCS is entitled to a judgment and order compelling Defendants and their agents to issue a special use permit and any other zoning approvals required for MetroPCS's proposed wireless facility to be located at the Site and compelling Defendants and their agents to issue any other required approval and/or permits, including, but not limited to, a building permit by the Building Inspector.

148. In addition, the fees charged by Mr. Comi's firm were incurred not for the purpose of any legitimate, good faith, lawful review of MetroPCS's application. Rather, Mr. Comi's and his firm's time was spent on delaying the review process, attempting to impose discriminatory extra-statutory requirements on MetroPCS, and mounting obstacles in the application process, such as by pressing MetroPCS to pursue a DAS alternative when Defendants were prohibited as a matter of law from forcing that preference on MetroPCS and from denying the application based on that preference. Moreover, the fees charged by the consultant, and the fees which the City's Zoning Code mandates be charged in connection with a review of a wireless siting application (ranging from $6,000 to $12,000) are grossly disproportionate to the $250-$500 filing fees required by the City for any other special use permit, and not reasonably related to the actual application review process. The City's fee structure therefore constitutes an illegal and impermissible tax on the wireless industry, which is neither permitted by the Telecommunications Act nor by New York law.

149. MetroPCS is therefore also entitled to judgment directing the disgorgement and return of all funds paid by MetroPCS for the purpose of paying the City's consultant in connection with MetroPCS's application (with the exception of a $500 filing fee

which is normally required in special use permit situations), directing that MetroPCS is not liable to pay any additional filing fees or fees for the City's consultant, whether invoiced or to be invoiced, and finding that the application fee structure as set forth in the wireless provisions of the City's Zoning Code is illegal.

SECOND CLAIM FOR RELIEF
(Violation Of Section 704 Of The Telecommunications Act: Unreasonable Delay)

150. MetroPCS repeats, re-avers and re-alleges all prior allegations as if fully set forth herein.

151. Section 704(b) of the Act (47 USC § 332(c)(7)(B)(ii)) provides that a "State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request."

152. In violation of this provision of the Telecommunications Act, Defendants failed to issue a determination on MetroPCS's application until September 16, 2009, approximately fifteen months after MetroPCS filed its application on June 19, 2008.

153. This delay is unreasonable, and has been held in this District to be presumptively unreasonable, as the delay was far in excess of six months.

154. As set forth herein, Defendants were repeatedly advised that failure to act within a reasonable timeframe would constitute a violation of the Telecommunications Act, yet Defendants let long intervals of time lapse (over a month during certain periods) without taking any action and without even responding to MetroPCS's attempts to contact Defendants in connection with its application. Defendants repeatedly ignored MetroPCS's requests to be placed on the agenda for consideration, based in part on Defendants' consultant's insistence that

MetroPCS respond to information unrelated to the applicable Code provisions and aimed at advancing the City's preferred DAS technology, in violation of federal law which preempts the field.

155. In contrast, when the DAS network application involving 56 antenna placements and 21 miles of cable was presented to the City and Mr. Comi's firm – both of which stood to financially gain from the rental of City-owned poles and from the consultant's review of the placement of each of the 56 antenna nodes, that application was approved in less than three months, notwithstanding that the City-owned property constituted the second highest priority siting under the City's Zoning Code, in contrast to the highest priority Site that was the subject of MetroPCS's application.

156. Defendants' unreasonable approximately fifteen month delay in making any determination on MetroPCS's application constitutes unreasonable delay in violation of Section 332(c)(7)(B)(ii) of the Telecommunications Act.

157. As such, MetroPCS is entitled to a judgment and order compelling Defendants and their agents to issue a special use permit and any other zoning approvals required for MetroPCS's proposed wireless facility to be located at the Site and compelling Defendants and their agents to issue any other required approval and/or permits, including, but not limited to, a building permit by the Building Inspector.

158. In addition, the fees charged by Mr. Comi's firm were incurred not for the purpose of any legitimate, good faith, lawful review of MetroPCS's application. Rather, Mr. Comi's and his firm's time was spent on delaying the review process, attempting to impose discriminatory extra-statutory requirements on MetroPCS, and mounting obstacles in the application process, such as by pressing MetroPCS to pursue a DAS alternative when Defendants

were prohibited as a matter of law from forcing that preference on MetroPCS and from denying the application based on that preference. Moreover, the fees charged by the consultant, and the fees which the City's Zoning Code mandates be charged in connection with a review of a wireless siting application (ranging from $6,000 to $12,000) are grossly disproportionate to the $250-$500 filing fees required by the City for any other special use permit, and not reasonably related to the actual application review process. The City's fee structure therefore constitutes an illegal and impermissible tax on the wireless industry, which is neither permitted by the Telecommunications Act nor by New York law.

159. MetroPCS is therefore also entitled to judgment directing the disgorgement and return of all funds paid by MetroPCS for the purpose of paying the City's consultant in connection with MetroPCS's application (with the exception of a $500 filing fee which is normally required in special use permit situations), directing that MetroPCS is not liable to pay any additional filing fees or fees for the City's consultant, whether invoiced or to be invoiced, and finding that the application fee structure as set forth in the wireless provisions of the City's Zoning Code is illegal.

THIRD CLAIM FOR RELIEF
(Violation Of Section 704 Of The Telecommunications Act: Insubstantial Evidence)

160. MetroPCS repeats, re-avers and re-alleges all prior allegations as if fully set forth herein.

161. Section 332(c)(7)(B)(iii) of the Telecommunications Act, as amended by Section 704, provides that "[a]ny decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record."

162. The Planning Board's Resolution does not cite any evidence in the record based on the applicable City Code criteria that would support the denial of MetroPCS's application, nor does the Resolution (or any evidence in the record for that matter) demonstrate in any way how or why the applicable City Code criteria were not satisfied.

163. There is no rational explanation for the conclusions reached by the Planning Board.

164. The Planning Board stated that the application could be denied because MetroPCS's application was somehow incomplete or that its materials were supposedly conflicting, but in fact MetroPCS's application submitted all information required by the Code.

165. The Planning Board stated that the application could be denied because MetroPCS allegedly failed to furnish additional information, but in fact the additional information requested was regarding DAS, which information Defendants had no legal authority to demand under the preemption doctrine enumerated in Clarkstown.

166. The Planning Board stated that the application could be denied because MetroPCS could supposedly achieve coverage through the DAS network, but the record is undisputed, and Mr. Comi admitted, that the existing network would not cover the subject area, and, in addition, Defendants could not legally impose a requirement to expand the network for this alternative technology under the preemption doctrine enumerated in Clarkstown.

167. The Planning Board stated that the application could be denied because MetroPCS declined to comply with Defendants' demand that MetroPCS drop its co-location plans for the subject Site (the highest priority Site under the City's own Code) in favor of a DAS network, but Defendants had no legal right to make such demand under the preemption doctrine addressed in Clarkstown.

168. The Planning Board stated that the application could be denied because MetroPCS's propagation maps supposedly showed conflicting information at different signal strengths, but this assertion was flatly negated by the record, which contained three unrefuted written explanations from MetroPCS's Senior RF Engineer, on October 29, 2008, on December 15, 2008, and on February 17, 2009, respectively, confirming that the data was consistent and that the coverage gaps were real.

169. The Planning Board stated that the application could be denied because MetroPCS was allegedly asked to look at other buildings where there are fewer or no wireless facilities in existence as alternative site candidates and the Planning Board claimed that detailed information was supposedly not provided, but the Planning Board ignored that Exhibit I to MetroPCS's application contained an alternative site analysis as required by the Code, and the Planning Board also ignored that a requirement that MetroPCS build its facility on an alternative Site would contravene the Code's prioritization of the placement of wireless facilities on sites where other carrier's facilities are already located – the subject Site here.

170. The record is devoid of a shred of evidence, let alone substantial evidence, to support the City's denial of MetroPCS's application, conclusively establishing that the denial was in violation of Section 332(c)(7)(B)(iii) of the Telecommunications Act.

171. As such, MetroPCS is entitled to a judgment and order compelling Defendants and their agents to issue a special use permit and any other zoning approvals required for MetroPCS's proposed wireless facility to be located at the Site and compelling Defendants and their agents to issue any other required approval and/or permits, including, but not limited to, a building permit by the Building Inspector.

172. In addition, the fees charged by Mr. Comi's firm were incurred not for the purpose of any legitimate, good faith, lawful review of MetroPCS's application. Rather, Mr. Comi's and his firm's time was spent on delaying the review process, attempting to impose discriminatory extra-statutory requirements on MetroPCS, and mounting obstacles in the application process, such as by pressing MetroPCS to pursue a DAS alternative when Defendants were prohibited as a matter of law from forcing that preference on MetroPCS and from denying the application based on that preference. Moreover, the fees charged by the consultant, and the fees which the City's Zoning Code mandates be charged in connection with a review of a wireless siting application (ranging from $6,000 to $12,000) are grossly disproportionate to the $250-$500 filing fees required by the City for any other special use permit, and not reasonably related to the actual application review process. The City's fee structure therefore constitutes an illegal and impermissible tax on the wireless industry, which is neither permitted by the Telecommunications Act nor by New York law.

173. MetroPCS is therefore also entitled to judgment directing the disgorgement and return of all funds paid by MetroPCS for the purpose of paying the City's consultant in connection with MetroPCS's application (with the exception of a $500 filing fee which is normally required in special use permit situations), directing that MetroPCS is not liable to pay any additional filing fees or fees for the City's consultant, whether invoiced or to be invoiced, and finding that the application fee structure as set forth in the wireless provisions of the City's Zoning Code is illegal.

FOURTH CLAIM FOR RELIEF
(For Declaratory Judgment Pursuant To 28 U.S.C. §§ 2201 and 2202)

174. MetroPCS repeats, re-avers and re-alleges all prior allegations as if fully set forth herein.

175. An actual and justiciable controversy exists between the parties, with MetroPCS on the one hand contesting the legality, as written, and as applied, of the application and consulting fee provisions of the wireless provisions of the City's Zoning Code, and, on information and belief, Defendants on the other hand denying the illegality thereof.

176. The Mount Vernon Code provides that "[t]he filing fee for an application to the Planning Board for a special use permit, except for wireless telecommunication facilities, shall be: $500.00 for a Special Use Permit application. $250.00 for an amendment to a Special Use Permit approval to request an extension of time."

177. Wireless telecommunication facilities are excepted because the City's Zoning Code imposes its own fee requirements that are not reasonably related to the actual application review process.

178. In this regard, Section 12(b) of the Zoning Code provides that an "applicant shall deposit with the City funds sufficient to reimburse the City for all reasonable costs of consultant and expert evaluation and consultation to the City in connection with the review of any application, including the construction and modification of the site, once permitted. The initial deposit shall be $8,500 . . . If at any time during the process this escrow account has a balance less than $2,500, the applicant shall immediately, upon notification by the City, replenish said escrow account so that it has a balance of at least $5,000." (Emphasis added.)

179. Section 17(a) of the Zoning Code provides that: "[a]t the time that a person submits an application for a special use permit for a new tower or collocating on an existing tower or other suitable structure where there is an increase in height of the tower or structure, such person shall pay a nonrefundable application fee of $12,000 to the City, such fee is exclusive of any and all other fees. If the application is for a special use permit for collocating on an existing tower or other suitable structure, where no increase in height of the tower or structure is required, the nonrefundable fee shall be $6,000."

180. As written, and as applied, neither Section 12(b) nor Section 17 are legal, as the fees imposed bear no reasonable relationship to the application review process, both in general and particularly in this case where the fees expended were for time spent by Defendants and their consultant for the purpose of obstructing MetroPCS's application, in violation of the Telecommunications Act and the City's own Code.

181. MetroPCS is therefore also entitled to judgment directing the disgorgement and return of all funds paid by MetroPCS for the purpose of paying the City's consultant in connection with MetroPCS's application (with the exception of a $500 filing fee which is normally required in special use permit situations), directing that MetroPCS is not liable to pay any additional filing fees or fees for the City's consultant, whether invoiced or to be invoiced, and finding that the application fee structure as set forth in the wireless provisions of the City's Zoning Code is illegal.

FIFTH CLAIM FOR RELIEF
(Violation Of Mount Vernon's Zoning Code)

182. MetroPCS repeats, re-avers and re-alleges all prior allegations as if fully set forth herein.

183. The evidence in the record required the approval of MetroPCS's application for a special use permit to install and operate a co-located wireless facility at the Site, which qualified as the highest priority site under the City's Zoning Code.

184. MetroPCS's application complied with all applicable requirements of the City's Code, including its wireless provisions.

185. Defendants' denial of MetroPCS's application was arbitrary and capricious and in violation of New York State law, including but not limited to the Mount Vernon Code and its wireless provisions.

186. As such, MetroPCS is entitled to a judgment and order compelling Defendants and their agents to issue a special use permit and any other zoning approvals required for MetroPCS's proposed wireless facility to be located at the Site and compelling Defendants and their agents to issue any other required approval and/or permits, including, but not limited to, a building permit by the Building Inspector.

SIXTH CLAIM FOR RELIEF
(Unjust Enrichment)

187. MetroPCS repeats, re-avers and re-alleges all prior allegations as if fully set forth herein.

188. In connection with its application, MetroPCS was required by the City to pay a total of $14,500, representing $6,000 for the application fee and $8,500 towards the consultant's escrow.

189. These funds were used not for the purpose of any legitimate, legal review of MetroPCS's application, but rather for time spent by Defendants and their consultant for the purpose of obstructing MetroPCS's application, in violation of the Telecommunications Act and the City's own Code.

190. Defendants have thus been unjustly enriched by the retention of $14,500 of MetroPCS's funds, which funds were taken from MetroPCS by Defendants without Defendants adhering to their obligations to use these funds for legitimate purposes or in connection with any legitimate review of MetroPCS's application.

191. Applying fundamental principles of equity, MetroPCS is entitled to a judgment directing the return of $14,500, with interest.

WHEREFORE, MetroPCS respectfully demands judgment of this Court on all of its Claims for Relief as follows:

a. On the First Claim For Relief, a judgment and order compelling Defendants and their agents to issue a special use permit and any other zoning approvals required for MetroPCS's proposed wireless facility to be located at the Site and compelling Defendants and their agents to issue any other required approval and/or permits, including, but not limited to, a building permit by the Building Inspector; and a judgment and order directing the disgorgement and return of all funds paid by MetroPCS for the purpose of paying the City's consultant in connection with MetroPCS's application (with the exception of a $500 filing fee which is normally required in special use permit situations), directing that MetroPCS is not liable to pay any additional filing fees or fees for the City's consultant, whether invoiced or to be invoiced, and finding that the application fee structure as set forth in the wireless provisions of the City's Zoning Code is illegal.

b. On the Second Claim For Relief, a judgment and order compelling Defendants and their agents to issue a special use permit and any other zoning approvals required for MetroPCS's proposed wireless facility to be located at the Site and compelling Defendants and their agents to issue any other required approval and/or permits, including, but not limited to, a building permit by the Building Inspector; and a judgment directing the disgorgement and return of all funds paid by MetroPCS for the purpose of paying the City's consultant in connection with MetroPCS's application (with the exception of a $500 filing fee which is normally required in special use permit situations), directing that MetroPCS is not liable to pay any additional filing fees or fees for the City's consultant, whether invoiced or to be invoiced, and finding that the application fee structure as set forth in the wireless provisions of the City's Zoning Code is illegal.

c. On the Third Claim For Relief, a judgment and order compelling Defendants and their agents to issue a special use permit and any other zoning approvals required for MetroPCS's proposed wireless facility to be located at the Site and compelling Defendants and their agents to issue any other required approval and/or permits, including, but not limited to, a building permit by the Building Inspector; and a judgment directing the disgorgement and return of all funds paid by MetroPCS for the purpose of paying the City's consultant in connection with MetroPCS's application (with the exception of a $500 filing fee which is normally required in special use permit situations), directing that MetroPCS is not liable to pay any additional filing fees or fees for the City's consultant, whether invoiced or to be invoiced, and finding that the application fee structure as set forth in the wireless provisions of the City's Zoning Code is illegal.

d. On the Fourth Claim For Relief, a judgment and order directing the disgorgement and return of all funds paid by MetroPCS for the purpose of paying the City's consultant in connection with MetroPCS's application (with the exception of a $500 filing fee which is normally required in special use permit situations), directing that MetroPCS is not liable to pay any additional filing fees or fees for the City's consultant, whether invoiced or to be invoiced, and finding that the application fee structure as set forth in the wireless provisions of the City's Zoning Code is illegal.

e. On the Fifth Claim For Relief, a judgment and order compelling Defendants and their agents to issue a special use permit and any other zoning approvals required for MetroPCS's proposed wireless facility to be located at the Site and compelling Defendants and their agents to issue any other required approval and/or permits, including, but not limited to, a building permit by the Building Inspector.

f. On the Sixth Claim For Relief, a judgment and order directing the return of $14,500, with interest.

g. On all Claims For Relief, MetroPCS's costs, attorneys' fees and any and all other damages and interest to which MetroPCS is lawfully entitled, together with such other and further relief as the Court deems just and proper.

Dated: White Plains, New York
October 1, 2009

Respectfully submitted,

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